IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 19TH DECEMBER 2006 / 28TH AGRAHAYANA 1928

CRL.A.No. 371 of 2006()

AGAINST ORDER IN CC.550/2004 of JUDL.MAGISTRATE OF FIRST CLASS COURT-V, THIRUVANANTHAPURAM

.....

APPELLANT: COMPLAINANT

GIRIJA THAMPY, T.C.13/2158,
RAMAKRISHNA BHAVAN, KUNNUKUZHY P.O.,
KANNAMMOOLA, THIRUVANANTHAPURAM.

BY ADV. SRI.BLAZE K.JOSE

RESPONDENTS: ACCUSED & STATE

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1. SUBHASH ALIAS (GOPAN),
T.C.39/404, CHALAI, THIRUVANANTHAPURAM.

2. STATE OF KERALA, REP. BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. C.M. NAZAR -R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 19/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 371 OF 2006

Dated this the 19th day of December, 2006

JUDGMENT

This appeal is filed against the order in C.C.No. 550 of 2004 on the file of the Judicial First Class Magistrate's Court V, Thiruvananthapuram by which the accused - first respondent herein was acquitted on the ground that the complainant was absent on the day on which the case was posted.

2. The case of the appellant is that the first respondent borrowed from her a sum of Rs.3,00,000/- and issued a cheque in her favour towards discharge of the debt and when the cheuqe was presented to the bank for encashment, the same was dishonoured due to insufficiency of funds in the account of the first respondent. After completing the statutory requirements, the appellant filed the complaint. The trial court took cognizance of the complaint and issued summons to the first respondent. Thereafter the case was posted to 21.11.2005 for evidence of the complainant. Since the complainant was absent on that day, the trial court acquitted the first respondent under Section 256(1) Cr.P.C.

3. Learned counsel appearing for the appellant submits that the

appellant could not appear before the court below on the date of posting of the case as she was laid up and that an application was also filed to that effect. A reading of the impugned order would show that the learned Magistrate had not considered the principle laid down by this Court in the decisions reported in **Don Bosco v. Partech Computers Ltd., 2005(2) K.L.T. 1003** and **G.F.S. Chit & Loans (P) Ltd. v. Rajesh, 2006(3) K.L.T. 825** . In the above two judgments, this Court had categorically held that the trial Magistrate should consider the requirement or necessity of the presence of the complainant on the date of posting of the case before passing an order under Section 256(1) Cr.P.C. In the above circumstances, this Court is of the view that the impugned order is illegal and liable to be set aside.

4. Accordingly, the order under challenge is set aside and the trial court is directed to take the case on file and dispose of the same afresh, in accordance with law. The parties shall appear before the court below on 17.2.2007.

The Crl. Appeal is allowed by way of remand.

(K.THANKAPPAN, JUDGE)

sp/

(K.THANKAPPAN, JUDGE)

sp/